Comparative concepts and connective integration

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COMPARATIVE CONCEPTS AND CONNECTIVE INTEGRATION

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The Core Issue of this Paper

The object of this study is so-called "connective integration": conceptual relationships between rules of two or more Member States. The issue of this paper is the suitability of comparative concepts for integration studies. The core issue[1] of this paper is how conceptual analysis in microcomparison[2] can contribute to acquiring knowledge about connective integration. In the context of integration, the applicability of comparative concepts is an open question.

Comparative concepts

"Comparative concepts" are concepts that belong to comparative law research and that enable us to articulate relationships between rules of two or more Member States. The comparative concept identifies legal rules within different systems and detects similarities between these rules. It is not necessary, however, to incorporate the comparative concept into national law. This concept is not a source of law, but a source of knowledge.

Comparative concepts are useful to comparative law research since the first problem the researcher will meet is that terminological resemblance does not guarantee any conceptual correspondence fixing the comparability of the rules of different legal systems. 'Pflichtteil' in German law only creates an obligation to pay a substitute in money for the value of the share which an heir has in the heritage. The same German word 'Pflichtteil' means something else in e.g. Swiss law: in Swiss law the 'Pflichtteil' is the guaranteed part of the heritage itself; it is

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1 The European integration process relies on the legal systems of Member States. Comparative law can be useful to connect these legal systems by selecting the rules considered to be the best possible solution to the legal problem that asks for integration. However, this practical matter is not the core issue of this paper.

2 Micocomparison is the investigation of legal rules of one system and the equivalent rules in at least one other system.

not the value of a share in the heritage. For the rest the Swiss 'Pflichtteil' is equivalent to the French 'réserve'.

Comparative concepts are useful to comparative law research and may be suitable for integration studies in particular. After all, real referents are important to describe the state of connective integration. Especially, it is important to acquire knowledge about the extent to which the diverse elements of legal systems are connected with one another. This implies that the criteria for comparative concepts must be observable and unequivocal, enabling us to investigate empirically the rules belonging to different legal systems. In order to comply with this, the comparatist must test the so-called "comparability assumption" on the legal systems compared. Since he wants to study real referents of the comparative concept, the comparatist needs the "comparability assumption". This starting point is a falsifiable hypothesis, a proposition constructed with a comparative concept and formulated in a metalanguage. The comparability assumption can be either true or false.

As I have analysed in my doctoral dissertation,[3] there are three forms of comparative concepts: extensional concepts, functional concepts and immanent concepts. These forms will be distinguished in this paper before examining their relative usefulness in connective integration. Examples will illustrate the characteristics of the three forms of comparative concepts.

Extensional concepts

First, the formation of extensional concepts seems an option to describe the state of an integration process. The formation of extensional concepts is the listing of common elements which may be present in several legal systems. These common elements are to be found at the intersection of different sets of legal rules, or parts of rules, belonging to different systems. In this approach, the national sets of rules could be identified by means of legal terms, e.g. the Dutch 'appartementsrecht', the German 'Wohnungseigentum' and the French 'copropriété des immeubles bâtis'. The extensional concept of 'apartment ownership' should refer to the common elements at the intersection.

I have developed the following arguments against extensional concepts: national terms cannot identify the common elements of, e.g., 'apartment ownership'. The juxtaposition of legal rules that have been identified by legal terms is not sufficient to conclude that common elements are present. These rules continue to be completely different things having different names. After all, the national terms 'Diebstahl' and 'theft' only refer to German and English rules, respectively, without relating these rules. Legal rules to be compared do not provide their own comparability. Without choosing any intension for the comparative concept, you cannot compare apples and oranges. The intersection containing the common elements can only be identified if the common characteristics of these rules are

[3] This doctoral dissertation has an English summary: Van Laer, C. (1997), *Het nut van comparatieve begrippen, Ius Commune Europaeum 20* (diss.) (Antwerpen/Groningen: Intersentia).

known. Rules are at the intersection of different legal systems if and only if they have the characteristics included in the common intension of the comparative concept.

Terminological resemblance does not guarantee any conceptual correspondence and does not signal any connective integration of elements of different legal systems. Knowledge about the properties of the comparative concept is vital in articulating relationships between rules of two or more Member States. Therefore, it has to be discussed which concepts are useful to integration: functional concepts on the one hand, or immanent concepts on the other.

Functional concepts

Functional concepts are guiding the comparative inquiry into the social and economic problems addressed in different legal systems. According to Zweigert and Kötz,[4] a social function is the common perspective the researcher needs. They state that rules of different legal systems can be compared if they serve the same function. In their view, the legal rules of every society essentially face the same problems. As Zweigert and Kötz are sceptical of the conceptual constructs of particular nations, complete abstraction from national concepts is to be achieved with the help of functional concepts. Thus instead of asking, 'What formal requirements are there for sales contracts in foreign law?', they prefer to ask 'How does foreign law protect parties from surprise?' In this exemplary phrasing, Zweigert and Kötz omit the legal concepts of 'formal requirements' and of 'sales contracts'. All this implies that the legal system is not so much a conceptual structure, but rather an instrumental apparatus.

I want to illustrate the consequences of the position taken by Zweigert and Kötz as follows: the formation of functional concepts occurs in relation to social problems such as housing shortage, to which, for instance, the rules of 'apartment ownership' are solutions assuming that the legislator cares about the building of apartments. Consequently, the comparatist has to investigate the societal impact of different sets of rules of 'apartment ownership'. Specifically, he has to investigate every desirable or undesirable effect of the legal rules of 'apartment ownership'. Such rules may promote the conforming behaviour of investors in one society, but may not have the same positive consequences in a different society because of impediments to the law's effective functioning. Illustrating one of the most important impediments, some ignorance of the law may intervene between the promulgation of the law and the behaviour of potential investors. The rate of conforming behaviour may vary greatly in the societies under investigation; this circumstance turns the formation of functional concepts into an almost arbitrary decision. Besides, the comparatist is not limited to those rules legally defined as rules of 'apartment ownership' since, according to Zweigert and Kötz, the starting point of comparison should not be found in law itself. If different rules may solve the social problem of housing shortage, the comparatist has to expand his research to functional equivalents such as building regulations.

[4] Zweigert, K. und H. Kötz (1996), *Einführung in die Rechtsvergleichung*, 3. neubearbeitete Auflage (Tübingen: J.C.B. Mohr), p. 11, p. 33, p. 43.

Zweigert and Kötz's functional concepts have their drawbacks since their functional approach rests upon several simplifying assumptions concerning the relationship between needs or problems of different societies on the one hand, and rules of different legal systems on the other. The social effect of legal rules is difficult to determine, so in most cases Zweigert and Kötz's functional concepts have no empirical use.

Functional concepts give some insight into the social reality to be regulated, but are too broad. Functional concepts may shed light on societal integration, but not on connective integration. The formation of functional concepts lead to disregarding the substantial differences that subsist between legal systems. Functional concepts do not show where the structure of the legal systems of Member States will be a serious obstacle to integration. Functional concepts go without the precision of legal concepts.

Immanent concepts

Analysing legislative definitions[5] is an excellent way to detect immanent concepts. To find observable criteria for the comparability assumption, the researcher can begin by analysing legislative definitions in order to determine the respect in which he can compare different legal systems. The definitions of the Dutch 'appartementsrecht' and of the German 'Wohnungseigentum' will illustrate this seemingly simple preparation of comparative studies. The Dutch 'appartementsrecht' is defined as follows: 'An apartment right means a share in the property which is involved in the division and includes the right to the exclusive use of certain portions of the building which, as indicated by their layout, are intended to be used as separate units'.[6] Section 1 of the German Condominium Act[7] defines 'Wohnungseigentum' differently: 'Residential property is the separate ownership of an apartment in connection with the co-ownership share of the joint property, to which it belongs'.

The important distinction is here that 'the right to the exclusive use', mentioned only by the Dutch legislator, does not imply the ownership of a specified part of the whole building, as it exists in German law. This implies that 'the right to the exclusive use' does not offer a common perspective, which could be chosen as a starting point. By contrast, the legislative definitions allow the researcher to compare if he proceeds from the uniform perspective of 'co-ownership'. The comparative concept of 'co-ownership' is the unequivocal intension which may be part of a comparability assumption. If this hypothesis is verified, it is possible to make a real distinction between the Dutch 'appartementsrecht' and the German 'Wohnungseigentum'.

5 Legislative or statutory definitions determine the scope of other rules in which the defined concept is used.

6 Netherlands Civil Code, book 5, section 106, subsection 3; translated by P.P.C. Haanappel and E. Mackaay.

7 Par. 1 Gesetz über das Wohnungseigentum und das Dauerwohnrecht.

The absence of legislative definitions makes it difficult to choose an immanent concept in order to determine the respect in which the researcher can compare different legal systems. In a case of absence of these definitions, the formation of immanent concepts depends on the structure of the conceptual systems in which these concepts have been embedded. If these systems exhibit almost the same structures, that is an indication that immanent concepts can be found. However, immanent concepts are of no empirical use if the hierarchies of legal systems are too divergent conceptually. Comparing the positions of concepts within their respective hierarchies is important to determine the relationship of these concepts but similar positions do not guarantee any conceptual correspondence fixing the comparability of the rules of different legal systems. I will illustrate this matter by giving an example that concerns English and French law.

A common characteristic cannot be found if branches of law do not show sufficient correspondence at higher and lower levels. E.g. 'real property' in English law and 'biens immeubles' in French law are branches of law missing a common characteristic at a higher, more general, level: while 'real property' looks to procedure, 'biens immeubles' looks to substance.[8] This fact impedes the comparatist in his search for a shared characteristic at a lower, more specific, level in the conceptual hierarchies of the respective legal systems. A common characteristic cannot be found for the English concept of 'chattel mortgage' on the one hand, and the French concept of 'hypothèque mobilière' on the other. The researcher is confronted with a gap when looking for a conceptual equivalent since the English 'chattel mortgage' and the French 'hypothèque mobilière' belong to different branches of law. The lack of a common characteristic at a higher, more general, level makes the structure of the conceptual systems being compared too divergent. First, this implies that immanent concepts are of no empirical use. Second, this implies that the structure of the legal systems is a serious obstacle to integration of the French rules into the English system or the other way round.

Degrees of connective integration

The application of immanent concepts can show degrees of connective integration. Since immanent concepts share characteristics common to two or more legal systems, the number of these characteristics shows the extent to which the diverse elements of legal systems are connected with one another. The following example will illustrate this statement.

The Dutch rules for 'full adoption' can be compared to the Austrian rules governing 'limited adoption' since they share the intension of the immanent concept 'adoption'. One common characteristic is sufficient. In this case, however, the degree of connective integration is lower as in the case that more specific characteristics are shared by national concepts. Let me explain this by using the following example.

[8] Bell, A.P. (1989) , *Modern Law of Personal Property in England and Ireland* (London/Edinburgh: Butterworths) p. 19; David, R. (1980), *English Law and French Law* (London/Calcutta: Stevens & Sons/Eastern Law House) p. 35.

More specific characteristics make the French distinction between the national concepts ‘adoption plénière’ or full adoption, and ‘adoption simple’ or limited adoption. Juxtaposing articles 356 and 364 of the French Civil Code may help the comparatist to find specific characteristics for this distinction: ‘Adoption confers on the child a filiation which substitutes for its original filiation; the adopted child ceases to belong to its family of blood, ...’; and: ‘An adopted child remains in his family of origin and conserves all its rights therein, ...’.[9] The first sentence refers to the effects of full adoption, the second one concerns limited adoption. Full adoption terminates all legal ties between the child and his biological family, limited adoption does not. Different legal effects establish the distinction between full adoption and limited adoption within the French system. The specific effects connected to legal rules could be national characteristics without counterparts in the other legal system under investigation.

In the case of adoption, the testing of the comparability assumption will show two common characteristics, so it is possible to determine a higher degree of connective integration between the Dutch and the French systems, or between the Austrian and the French systems. The French system has specific counterparts in two foreign systems under investigation, but the Dutch and the Austrian systems are sharing only one characteristic. According to this example, the French system is more integrated than the Dutch or the Austrian system.

Conclusion

Extensional concepts are not fit to acquire knowledge about relationships between legal systems, as has been explained. The functional concept does not aim at describing the structure of legal systems, but at the better adaptation of rules to ends. Immanent concepts are useful in describing the state of connective integration and in showing where the structure of the legal systems of Member States will be a serious obstacle to integration.

Summing up, immanent concepts specify the state of connective integration. They enable one to compare different legal systems more accurately in the respects that are relevant. In the context of connective integration, they provide a source of precise information concerning relationships between legal systems. If the hierarchies of legal systems are too divergent conceptually, the formation of immanent concepts shows where the structure of the legal systems of Member States will be a serious obstacle to integration. Finally, the application of immanent concepts can even chart the degree of connective integration.

[9] Article 356: L'adoption confère à l'enfant une filiation qui se substitue à sa filiation d'origine; l'adopté cesse d'appartenir à sa famille par le sang, ... Article 364: L'adopté reste dans sa famille d'origine et y conserve tous ses droits, ... These articles have been translated by J.H. Crabb.